Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004	)	MB Docket No. 05-49
	)	
	)	
Implementation of Section 340 of the Communications Act	)	

JOINT REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND OF THE ABC, CBS, FBC, AND NBC TELEVISION AFFILIATE ASSOCIATIONS

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Summary

The National Association of Broadcasters and the Network Affiliates submit these reply comments in the Commission's proceeding to implement Section 340 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"), which permits satellite delivery of a television broadcast station's signal outside the station's DMA to satellite subscribers located in communities where the station is "significantly viewed." NAB and Network Affiliates agree with many of the Commission's tentative conclusions and with other commenters on a number of issues. However, with regard to some issues, including the definition of a satellite community, the definitions of "equivalent" and "entire" bandwidth, and certain retransmission consent questions, NAB and Network Affiliates believe that other commenters have misinterpreted the language of SHVERA and have urged the Commission to implement the statute contrary to congressional intent and sound policy.

DIRECTV's and EchoStar's proposals to utilize zip codes to define satellite communities should be rejected. Zip codes neither represent nor define communities. "Community" in Section 340 of the Communications Act should be interpreted the same as in Section 307(b) of the Act. Otherwise, traditional communities will be ignored, artificial "communities" will be created, cable will be unfairly disadvantaged since it may not be able to obtain a local franchise to serve specific zip codes, and broadcasters will be harmed by the selective "Swiss-cheesing" of their program exclusivity rights. Geocoding software currently exists that permits the accurate placement of subscriber households within communities as traditionally understood in the Commission's Section 307(b) regulatory scheme.

EchoStar's proposal to extend significantly viewed retransmission authority to satellite

carriers to up to 90% of a zip code-based population that is ineligible for the signal would violate SHVERA's directive to use the same rules and processes for determining significant viewing for cable and satellite. Moreover, EchoStar's scheme is artificial and is open to gaming the significantly viewed system. The Commission, over the last 30 years, has developed a system to avoid manipulation of the significantly viewed regime. EchoStar's proposal would eviscerate that system and would require extraordinary time and effort to establish and maintain.

DIRECTV's alternative suggestion to define satellite communities on a county-wide basis should also be rejected. The Commission has, since 1973, expressly maintained that county-wide data could *not* be used for surveys for new additions to the significantly viewed list. No compelling justification has been provided to deviate from these 30+ years of precedent.

DIRECTV's "equivalent bandwidth"/"entire bandwidth" proposal is plainly contrary to SHVERA. It would permit any form of discrimination against a local broadcast station so long as it was not deemed "material" under some undefined and unquantified "overall carriage basis."

EchoStar's proposal that the "equivalent bandwidth" and "entire bandwidth" requirements should apply only to the primary video feed of the local station is also without merit. As the Commission correctly states in the *Notice* (at ¶ 44), "if the local network station is broadcasting in multicast format, and the significantly viewed network affiliate is broadcasting in HD format, the satellite carrier may carry the HD signal of the significantly viewed network affiliate under the 'equivalent bandwidth' requirement, *provided that it carries the local network station's multicast signals*." This conclusion is supported by the legislative history of the provision.

The appropriate and non-discriminatory solution to the equivalent and entire bandwidth requirements is apportioning bandwidth on a statistically multiplexed basis. Apportioning bandwidth in this manner would mean, for example, that if a local station is broadcasting an SD

stream containing a comedy program and the significantly viewed distant station is broadcasting an SD stream containing a high speed chase requiring more bits than the comedy, the distant signal could consume more bits, provided that, *on average*, both SD streams are provided *equivalent* bandwidth. But the "equivalent" bandwidth or the "entire" bandwidth requirement could *not* be satisfied if a satellite carrier retransmitted a distant signal in HD format while retransmitting only one of multiple SD streams of a local signal, as DIRECTV suggests it should be able to do. A distant HD signal is simply not "equivalent" to a single local SD signal under the statute, and the retransmission of one SD programming stream out of several is not the "entire" bandwidth utilized by the local station.

DIRECTV poses the dilemma that it cannot keep track of, and account for, shifts between HD and multicast carriage by local and significantly viewed distant stations throughout the broadcast day. NAB and Network Affiliates' solution to this dilemma is to provide satellite carriers with two options: Either the satellite carriers must implement a mechanism to account for such shifts, at least for each daypart (such as prime time and local news), which can be accomplished with currently existing technologies, *or* they must carry the entire bandwidth of the local station.

The satellite carriers' proposal that a local station's failure to reach a retransmission consent agreement with a satellite carrier should not bar importation of a significantly viewed signal from a duplicating distant network station would violate SHVERA. Section 340(b)(1) and (2)'s explicit language could not be any clearer. A condition precedent to delivery of a duplicating significantly viewed out-of-market station is that a subscriber "receive" the local affiliate. The statute nowhere creates exceptions for failure of the local affiliate and the satellite carrier to reach retransmission consent agreement or otherwise.

DIRECTV's assertion that it is a violation of the good faith bargaining obligations if a local

station attempts to negotiate with a satellite carrier *not* to import significantly viewed signals into its local DMA is without foundation. Inherent in the Commission's *Good Faith Order* is a finding is that it is *not* inconsistent with competitive marketplace considerations and the good faith negotiation requirement for a local broadcast station to offer a proposal that forecloses carriage of other programming services by the MVPD that substantially duplicate the local broadcast station's programming. This is precisely what is at stake with a significantly viewed duplicating signal. Satellite carriers are neither required to retransmit local commercial broadcast stations that substantially duplicate the programming of another local commercial broadcast station nor are they required to retransmit a distant broadcast station that is significantly viewed and that broadcasts programming that is duplicative of programming aired by a local broadcast station. Consequently, to maintain parity, there can be no restriction on a broadcast station bargaining to prevent importation of a substantially duplicating significantly viewed signal whose carriage is not legally mandated.

EchoStar asserts that (1) local-into-local service in a market need not be provided before importing a significantly viewed network signal into that market if there is no affiliate of the same network in that market; (2) the Commission should retain the right to intervene in the waiver process; (3) required notices should not have to be sent by certified mail; and (4) satellite carriers should be permitted to utilize a zip code look-up function on their websites to retrieve lists of significantly viewed signals in lieu of providing complete lists of such signals. For the reasons set forth below, all of these proposals are without merit and should be rejected.

Therefore, for the reasons set forth herein and in their opening comments, NAB and Network Affiliates respectfully request that the Commission implement SHVERA's significantly viewed provisions as explained herein and in their joint comments.

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JOINT REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND OF THE ABC, CBS, FBC, AND NBC TELEVISION AFFILIATE ASSOCIATIONS

The National Association of Broadcasters ("NAB") and the ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the FBC Television Affiliates Association, and the NBC Television Affiliates Association (collectively, the "Network Affiliates") (jointly, "NAB and Network Affiliates"), by their attorneys, hereby reply to comments filed in response to the *Notice of Proposed Rule Making* ("*Notice*"), FCC 05-24, released by the Commission on February 7, 2005, in the above-referenced proceeding.[1]

I. Definition of "Satellite Community"

In its comments, DIRECTV argues that the concept of "community" should be defined in

[1] NAB is a nonprofit, incorporated association of radio and television broadcast stations that serves and represents the American broadcast industry. The Network Affiliates collectively represent approximately 800 local television stations affiliated with the ABC, CBS, Fox, and NBC Television Networks.

terms of five digit zip codes.[2] EchoStar Satellite L.L.C. ("EchoStar") also argues for the use of zip codes, although it says that zip + 4 codes are acceptable for "more granularity."[3] But zip codes neither represent nor define communities. As NAB and Network Affiliates showed in their opening joint comments, "community" in Section 340 of the Communications Act should be interpreted the same as in Section 307(b) of the Act. Otherwise, traditional communities will be ignored, artificial "communities" will be created, cable will be unfairly disadvantaged since it may not be able to obtain a local franchise to serve specific zip codes, and broadcasters will be harmed by the selective "Swiss-cheesing" of their program exclusivity rights.[4] MPAA likewise urged the Commission to develop a definition of community that can be consistently applied to an integrated Significantly Viewed List for both cable operators and satellite carriers.[5]

The satellite carriers' comments demonstrate the potential mischief in using zip codes to define a satellite community. For example, EchoStar argues that, if a zip code extends beyond the boundaries of a community and if 10% of the zip code's population is included in the community, then the *entire* zip code should be included for service purposes.[6] There is no basis in SHVERA to extend significantly viewed retransmission authority to satellite carriers to 90% of a population that is ineligible to receive the signal. Even DIRECTV acknowledges that satellite carriers "will have

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[2] *See* DIRECTV Comments at 4.

[3] EchoStar Comments at 10.

[4] *See* NAB and Network Affiliates Joint Comments at 12-14.

[5] *See* MPAA Comments at 2.

[6] *See* EchoStar Comments at 10.

to deny service to eligible subscribers in order to avoid providing service to ineligible subscribers."[7] EchoStar's scheme is artificial and too easily open to gaming the significantly viewed provisions. The Commission has, for more than 30 years, studiously avoided manipulation of the significantly viewed regime:

> [W]e have established certain standards that have to be followed in taking individual surveys, so that survey methods, survey times, etc. are *not* keyed to produce only the desired results and so that numerous surveys are *not* taken with the hope that through random variations a favorable sample and result are finally achieved. We see no reason not also to require that the required viewing level is attained in the cable *community* in question where the showing is in support of a specific application.
>
> . . . Our concern in this area is that we have some reasonable assurance that the survey information presented to us has not been *manipulated* to produce the desired results.[8]

As NAB and Network Affiliates pointed out in their joint comments, a zip code definition of satellite community could permit satellite carriers to gerrymander a purported "satellite community" by cherry-picking just those zip codes with the requisite audience share.[9] EchoStar's 10% scheme is the start of just this type of practice and manipulation that Congress did not intend and that the Commission has been wary of for three decades.[10]

Similarly, DIRECTV argues that "signals are significantly viewed in a county only where

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[7] DIRECTV Comments at 7.

[8] *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, 36 FCC Rcd 2d 326 (1972), at ¶¶ 60-61 (emphases added).

[9] *See* NAB and Network Affiliates Joint Comments at 14 n.27.

[10] Moreover, EchoStar's 10% scheme would be extraordinarily difficult to administer and monitor. It would require, *inter alia*, ascertaining and constantly updating population data for the countless zip codes that are neither wholly inside nor wholly outside of the communities on the Significantly Viewed List.

cable and county boundaries coincided (at least when the original significantly viewed determination was made)" and hence future communities, whether cable or satellite, should be defined "in terms of zip codes, *or at least in terms of counties*."[11] While the Commission's original significantly viewed determinations were based on counties, that was only because the viewership data readily available was "provided on a county-wide basis only."[12] The Commission recognized, at the time, that such data "may not account for variations in viewing levels among communities within the county," but it accepted these survey data because of a "strong desirability of certainty" for both cable operators and broadcasters.[13] In fact, the Commission expressly stated that county-wide data could *not* be used for surveys for new additions to the significantly viewed list after March 31, 1973.[14] It is, therefore, clear that the Commission listed certain signals as significantly viewed in certain counties as a starting point only—to get the regulatory scheme up and running—but it has, for the past 33 years, eschewed the use of county-wide survey data. DIRECTV's alternative proposal to define a satellite community in terms of a full county would require reversal of a policy the Commission has endorsed for more than three decades.

As NAB and Network Affiliates argued, geocoding permits the accurate placement of subscriber households within communities as traditionally understood in the Commission's

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[11] DIRECTV Comments at 3 n.5, 7 (emphasis added).

[12] *Cable Television Report and Order*, 36 FCC 2d 143 (1972), at ¶ 85.

[13] *Id*.

[14] *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, 36 FCC Rcd 2d 326 (1972), at ¶ 60 ("We see no reason, however, to permit surveys of this type to be made on a county-wide basis.").

Section 307(b) regulatory scheme.[15] The satellite carriers have failed to explain why existing SHVA/SHVIA/SHVERA compliance software and tools that geocode subscriber household addresses for delivery of distant network signals to "unserved" households in white areas cannot be employed to determine the location of subscriber household addresses for significantly viewed signals.[16] NAB and Network Affiliates do agree, however, with DIRECTV's suggestion that broadcast stations should not be entitled to seek damages for an unauthorized retransmission if the retransmission is based on the good faith use of an eligibility determination made with geocoding software by a professional and truly independent third-party.[17]

II. Digital Service Limitations

DIRECTV correctly states that the "equivalent bandwidth" and "entire bandwidth" provisions in Section 340(b)(2)(B) "were meant to provide non-discrimination protections for incumbent broadcasters."[18] But then DIRECTV argues that the "equivalent bandwidth" and "entire bandwidth" restrictions prohibit only "*material discrimination as measured on an overall carriage (not program*

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[15] *See* NAB and Network Affiliates Joint Comments at 14 n.26.

[16] The fact that geocoding may entail modification of a satellite carrier's billing and conditional access systems is no reason to reject a solution that fully complies with SHVERA and maintains the interrelatedness of the full Communications Act statutory scheme, as does the concept of "community" in Section 307 and in Section 340. Congress, in amending the existing law and in expanding the footprint of the compulsory license for satellite carriers, did not contemplate that satellite carriers should receive all the benefits of the new expanded copyright license without incurring any administrative or other expenses—and surely Congress did not intend for satellite carriers to be insulated from any expenses that are incurred by their cable competitors. In the significantly viewed provisions, Congress has created still another compulsory copyright license in derogation of copyright holders' traditional rights, and satellite carriers cannot reasonably complain if they should have to expend some effort and expense to implement it.

[17] *See* DIRECTV Comments at 6 n.11.

[18] DIRECTV Comments at 8.

or minute-by-minute) basis."[19] DIRECTV demonstrates what it means by this highly qualified "overall carriage basis" by stating that it would be in compliance with the rule, while retransmitting only one program stream from each station, "even if the two stations do not transmit HD programming at the same time" (i.e., if the distant significantly viewed station is broadcasting an HD stream when the local station is broadcasting an SD stream, and vice versa) or "even if the two stations do not transmit exactly the same number of hours of HD programming."[20] This *would* result in discrimination. Presumably, DIRECTV would argue that the discrimination is not "material" in terms of some sort of undefined and unquantified "overall carriage basis." As such, DIRECTV's proposed compliance standard is hopelessly vague—and unenforceable. It is not what Congress intended by mandating equivalent and entire bandwidth protection for local stations.

For example, assume that a local small market television station broadcasts three hours of HD programming during prime time and that it broadcasts two SD programming streams the remaining 21 hours each day. Assume further that a distant large market broadcast station whose signal is significantly viewed in the small market broadcasts four hours of HD programming, three hours during prime time and the other one hour for its own 6:00 pm and 11:00 pm half-hour newscasts. DIRECTV appears to be arguing that it can retransmit, as broadcast, both the local and distant stations' HD programming streams and only one—but not both—of the local station's SD programming streams when it is multicasting without violating either the equivalent or entire bandwidth mandate.[21] But a proposal that permits *any* discrimination short of "overall carriage"

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[19] DIRECTV Comments at 11 (emphasis in original).

[20] DIRECTV Comments at 12.

[21] *See* DIRECTV Comments at 12 (stating, in DIRECTV's own assumptions of compliance, (continued...)

discrimination is *still* discrimination against the local broadcast station precisely in a fashion that Congress prohibited. During the periods when the local station may be multicasting, DIRECTV, under its proposal, would be retransmitting only one local SD program stream, occupying less bandwidth, while it is simultaneously retransmitting the distant HD program stream, utilizing greater bandwidth. It is clear, therefore, that DIRECTV would not be devoting "equivalent" bandwidth for retransmission of the local station's signal or retransmitting the "entire" bandwidth of the local station, and these shortcomings are in express violation of the equivalent and entire bandwidth provisions of SHVERA.

NAB and Network Affiliates agree that the equivalent and entire bandwidth provisions were intended to be "supple."[22] But this must mean that the provisions need not be interpreted in a strictly rigid fashion in order to prevent discrimination against the local station. When an SD programming stream is statistically multiplexed (i.e., thrown into a "statmux" pool) with other signals, the one SD stream typically requires, with current technologies, approximately 2-3 Mbps, *on average*, to provide good SD resolution without pixelization, softness, or other degrading artifacts. At any given instant, that one SD stream may momentarily require 4.5 Mbps, and, at other times, 1 Mbps may be adequate. The multiplexer can apportion additional bandwidth to the SD stream when needed and can apportion less bandwidth to the SD stream when another programming stream requires additional bandwidth and the one SD stream will not be starved for bits. An HD programming stream may similarly be statistically multiplexed with other signals, but one HD stream typically

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[21](...continued)
that it is limiting itself to retransmitting "a single programming stream for each station").

[22] DIRECTV Comments at 9.

requires, with current technologies, approximately 11-14 Mbps, *on average*.

The "suppleness" in the equivalent and entire bandwidth concepts permits statistical multiplexing to work. NAB and Network Affiliates do not object to, and do not find discriminatory, apportioning bandwidth on a statistically multiplexed basis. In other words, the equivalent bandwidth requirement is satisfied if the local station is broadcasting an SD stream containing a comedy program and the significantly viewed distant station is broadcasting an SD stream containing a drama program and, at any given instant, the drama (say, a high-speed chase) requires more bits than the comedy, provided that, *on average*, both SD streams are provided *equivalent* bandwidth. Similarly, if the local station is broadcasting its local news in HD and the distant significantly viewed station is broadcasting a sporting event in HD, the equivalent bandwidth requirement is satisfied so long as the multiplexer is "allocat[ing] bandwidth rationally as between [the] sports and 'talking head' programming."[23]

But clearly the "equivalent" bandwidth/"entire" bandwidth requirement cannot be satisfied by retransmitting a distant signal in HD format when the local signal consists of a multicast in SD format and all local multicast SD streams are not being simultaneously retransmitted. A distant HD signal is simply not "equivalent" to a single local SD signal under the statute, and the retransmission of one SD programming stream out of several is not the "entire" bandwidth utilized by the local station.

DIRECTV claims that it cannot keep track of the signals of thousands of television stations

[23] DIRECTV Comments at 13.

throughout the broadcast day.[24] NAB and Network Affiliates cannot speak to the configuration of DIRECTV's retransmission system, but the technology and equipment currently exists to make the significantly viewed regime, in general, and the equivalent and entire bandwidth provisions, in particular, work. Because broadcast signals must be backhauled to the satellite transmission facility, at that point the carrier's multiplexers can dynamically determine whether the local station's signal (as well as the distant station's signal) is HD or SD (and comprised of one or more streams).[25] This determination does not mean that the distant signal cannot benefit from the statmux pool; rather, it simply means that if a satellite carrier desires to retransmit a distant HD signal, then, if the local station is multicasting at that time, the satellite carrier must retransmit all of the local station's multicast SD streams at that same time. In other words, the satellite carrier must either determine the local station's bandwidth requirements, statistically averaged, and provide no more bandwidth, statistically averaged, for the distant significantly viewed signal, at least as to each daypart, *or*, in the alternative, retransmit the local station's *entire* bandwidth.

EchoStar's brief argument that the "equivalent bandwidth" and "entire bandwidth" restrictions should apply only to the primary video feed of the local station is without merit.[26] The interpretation urged by EchoStar neither appears in the statutory language nor in its legislative history. As the Commission correctly states, "if the local network station is broadcasting in multicast format, and the significantly viewed network affiliate is broadcasting in HD format, the satellite

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[24] *See* DIRECTV Comments at 11.

[25] For instance, the number of program streams carried in a digital signal is contained in that signal's PSIP information, and the video resolution (i.e., SD or HD) is carried in the Sequence Header of the MPEG2 video data.

[26] *See* EchoStar Comments at 15.

carrier may carry the HD signal of the significantly viewed network affiliate under the 'equivalent bandwidth' requirement, *provided that it carries the local network station's multicast signals*."[27] The Commission's conclusion is fully in accord with congressional intent:

> Section 340(b)(2)(B) prevents the satellite operator from retransmitting a local affiliate's digital signal in a less robust format than a significantly viewed digital signal of a distant affiliate of the same network, such as by down-converting the local affiliate's signal but not the distant affiliate's signal from high-definition digital format to analog or standard definition digital format. Section 340(b)(2)(B)(i) speaks of "equivalent bandwidth" to recognize, for example, that a local affiliate may be *multicasting* while a distant affiliate of the same network may be broadcasting in high-definition, and to ensure that the local affiliate's *choice to multicast* does not prevent the satellite operator from retransmitting a significantly viewed signal of a distant affiliate of the network that chooses to broadcast in high-definition.[28]

There is no question that Congress anticipated that a local station may choose to multicast and that it is a requirement that the satellite carrier retransmit those multicast programming streams if the satellite carrier desires to retransmit a distant signal in HD format.

EchoStar's claim that this obvious interpretation is contrary to the Commission's recent denial of mandatory multicast rights under the 1992 Cable Act[29] not only ignores the plain intent of Congress, but it misconstrues the wholly voluntary nature of SHVERA's significantly viewed

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[27] *Notice* at ¶ 44 (emphasis added).

[28] H.R. REP. 108-634 (2004), at 12 (emphases added).

[29] *See* EchoStar Comments at 15. NAB and many others disagree with the Commission's conclusion in this regard. On April 21, 2005, numerous parties filed petitions for reconsideration challenging, *inter alia*, the Commission's decision on multicast must carry, including NAB and the Association for Maximum Service Television, Inc.; ABC Television Affiliates Association, CBS Television Network Affiliates Association, NBC Television Affiliates, ABC Owned Television Stations, and NBC and Telemundo Stations; Paxson Communications Corp.; DIC Entertainment Corp.; and Minority Media and Telecommunications Council and Hispanic Technology and Telecommunications Partnership.

regime.[30] Accordingly, even if the Commission's recent decision to forego imposing *mandatory* carriage requirements for multicast programming streams is valid,[31] which we believe it is not, as stated above, that decision is, nevertheless, totally irrelevant to a satellite carrier's *voluntary* decision to accept the benefits (together with accepting the corresponding responsibilities and obligations) of the significantly viewed provisions.[32] The Fourth Circuit has already rejected a virtually identical argument with respect to the scrutiny to be applied and the governmental interests at stake that was raised by EchoStar and the satellite industry challenging the carry one, carry all rule following implementation of SHVIA.[33] EchoStar's argument is equally unavailing here.

In response to DIRECTV's and EchoStar's bandwidth proposals, NAB and Network Affiliates point out that satellite carriers should not expect to receive all of the financial and competitive benefits of the significantly viewed provisions without expenditure. The compulsory copyright license confers a distinct benefit on satellite carriers and allows them to compete more effectively with cable operators. Like all compulsory licenses, the Section 119(a)(3) license, which

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[30] *See* 47 U.S.C. § 340(d)(1) ("Carriage of a signal under this section is *not* mandatory . . . ." (emphasis added)).

[31] *See Carriage of Digital Television Broadcast Signals*, Second Report and Order and First Order on Reconsideration, FCC 05-27 (Feb. 23, 2005).

[32] In other words, if Echostar voluntarily chooses to carry the signals of significantly viewed distant stations, then it must abide by the bandwidth restrictions of SHVERA. EchoStar simply cannot rely on a Commission decision which has subsequently been challenged and which concerns a different issue determined pursuant to a different, unrelated statute (the 1992 Cable Act) in order to avoid complying with the clear terms of Section 340(b)(2)(B). To allow Echostar to discriminate against local multicasting stations by carrying only one of their programming streams, while choosing to carry either the multiple streams or the HD signal of distant stations, plainly violates both the "equivalent bandwidth" language of SHVERA and congressional intent to promote localism and prevent satellite operators from disfavoring local stations.

[33] *See Satellite Broadcasting & Communications Ass'n v. FCC*, 275 F.3d 337 (4th Cir. 2001), *cert. denied*, 536 U.S. 922 (2002).

permits *copyright royalty-free* satellite carriage of significantly viewed signals, comes with limitations and conditions. Moreover, SHVERA *does not compel* satellite carriers to retransmit significantly viewed signals; satellite carriers may choose to do so on their own volition, and they may charge their subscribers for the service. This scheme does not mean, nor was it intended, that satellite carriers can enjoy the benefits of their new compulsory license without strict adherence to its limitations and conditions. This is particularly true where a failure of such adherence would result in local broadcast stations suffering discrimination in contravention of the statute just because it is easier or cheaper for a satellite carrier to operate in a fashion that harms the local station, even if unintentionally.

III. Retransmission Consent Issues

DIRECTV and EchoStar both argue that if a local station fails to reach a retransmission consent agreement with a satellite carrier, then such failure is no bar to importation of a significantly viewed signal from a duplicating distant network station. DIRECTV specifically claims that otherwise the local station can essentially "block" carriage of significantly viewed signals.[34]

While this could be true hypothetically,[35] it is what the statute provides in plain, unambiguous words. Section 340(b)(1) and (2)'s explicit language could not be clearer. As NAB and Network Affiliates demonstrated in their opening joint comments, a condition precedent to delivery of a duplicating significantly viewed out-of-market station is that a subscriber "receive" the local

[34] *See* DIRECTV Comments at 17; EchoStar Comments at 14.

[35] As a practical matter, the notion that a local station would preclude carriage by a satellite carrier of its own signal in its own local market just to "block" importation of a distant significantly viewed signal defies all common and economic sense.

affiliate.[36] The statute nowhere creates exceptions for failure of the local affiliate and the satellite carrier to reach a retransmission consent agreement or otherwise. An exception to the statute cannot be manufactured out of thin air. Congress sought to protect localism through this "receive" requirement and also to prevent satellite carriers from by-passing local stations or using the threat of delivery of out-of-market stations to extract more favorable retransmission consent terms.[37] It would be reversible error for the Commission to ascribe to the statute a meaning and result plainly at odds with the stated, unequivocal will of Congress.[38]

DIRECTV further argues that it is a violation of the good faith bargaining obligations if a local station attempts to negotiate with a satellite carrier *not* to import significantly viewed signals into its local DMA.[39] Although DIRECTV acknowledges—correctly—that "the Commission is not generally comfortable delving into the specific terms of retransmission consent agreements,"[40] DIRECTV, apparently, is asking the Commission to make yet another exception in this instance.

The Commission's *Good Faith Order* implementing the good faith bargaining obligations imposed by SHVIA does not specifically address the negotiating proposal about which DIRECTV complains, but a similar bargaining proposal that is addressed is highly informative. In its *Good*

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[36] *See* NAB and Network Affiliates Joint Comments at 16-17.

[37] *See* H.R. REP. 108-634, at 12 (explaining that Sections 340(b)(1) and 340(b)(2)(A) were intended "to protect and promote localism").

[38] *See, e.g.*, *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 376 (1986) (reversing FCC decision regarding telephone depreciation practices as contrary to language, structure, and legislative history of Communications Act and "admonish[ing]" Commission that "only Congress can rewrite this statute").

[39] *See* DIRECTV Comments at 17-18.

[40] DIRECTV Comments at 18.

Faith Order, the Commission found that it would be presumptively inconsistent with competitive marketplace considerations and the good faith negotiation requirement for a broadcast station to offer a proposal that "specifically foreclose[s] carriage of other programming services by the MVPD that *do not substantially duplicate the proposing broadcaster's programming*."[41] Inherent in the Commission's finding is that it is *not* inconsistent with competitive marketplace considerations and the good faith negotiation requirement for a local broadcast station to offer a proposal that forecloses carriage of other programming services by the MVPD that substantially duplicate the local broadcast station's programming. Otherwise, the Commission would not have qualified its finding in the manner that it did. The Commission is well aware of the importance of program exclusivity to the economic viability of local broadcast stations,[42] and it is critical to local broadcast stations that they be permitted to negotiate at arm's length with MVPDs to protect the exclusivity of their programming from duplicating programming.

Moreover, there is an element of reciprocity in this context since satellite carriers are neither required to retransmit local commercial broadcast stations that substantially duplicate the programming of another local commercial broadcast station[43] nor required to retransmit a distant broadcast station that is significantly viewed and that broadcasts programming that is duplicative of

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[41] *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445 (2000) ("*Good Faith Order*"), at ¶ 58 (emphasis added).

[42] *See generally Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd 5299 (1988) ("*Program Exclusivity Order*"); NAB Comments and Reply Comments in MB Docket No. 05-28; Network Affiliates Comments and Reply Comments in MB Docket No. 05-28.

[43] *See* 47 U.S.C. § 338(c)(1) (providing exception to general carry one, carry all local station carriage requirement by not requiring carriage of signal of local commercial broadcast station that substantially duplicates the signal of another local commercial broadcast station).

programming aired by a local broadcast station.[44] Because the good faith negotiation requirement now applies to satellite carriers (and other MVPDs),[45] and satellite carriers are not legally required to retransmit duplicating signals (whether significantly viewed or otherwise), satellite carriers have no obligation to bargain in good faith with a broadcast station for carriage of a duplicating signal. Given this freedom, and in the interest of regulatory parity, there can be no restriction on a broadcast station bargaining to prevent importation of a substantially duplicating significantly viewed signal whose carriage is not legally mandated. And this provides an additional reason—to maintain reciprocity—why such a bargaining proposal is not a violation of the good faith bargaining standards.

In short, it would be inappropriate for the Commission to intervene in the complex contractual negotiations entered into at arm's length by sophisticated private parties. Localism and the public interest would best be served by allowing local stations and MVPDs to determine the extent to which duplicating signals may be retransmitted.

IV. Miscellaneous Issues

EchoStar raises four miscellaneous points that require rebuttal. *First*, EchoStar argues that it is not necessary for a satellite carrier to offer local-into-local service in a market before it imports a significantly viewed signal if there is no station in the local market affiliated with the same network as the signal being imported.[46] This is simply a blatant attempt to avoid local-into-local obligations.

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[44] *See* 47 U.S.C. § 340(d)(1) (providing that carriage of significantly viewed signals is not mandatory).

[45] *See* 47 U.S.C. § 325(b)(3)(C)(iii).

[46] *See* EchoStar Comments at 14.

EchoStar would have the Commission ignore the plain language of Section 340(b)(3), which provides:

> The limitations in paragraphs (1) and (2) shall not prohibit a retransmission under this section to a subscriber located in a local market *in which there are no network stations affiliated with the* ***same*** *television network as the station whose signal is being retransmitted* pursuant to this section.[47]

This exception to the limitations in Section 340(b)(1) and (2) does not trump the compulsory license restriction in Section 119(a)(3)(B) requiring that local-into-local service be offered by the satellite carrier, and received by the subscriber, before a significantly viewed signal may be imported and subsequently received by that subscriber. It is true, as EchoStar argues, that "[s]tatutes must be read as a whole and every provision should be given effect,"[48] but the axiom defeats, rather than supports, EchoStar's contention: EchoStar would read the "receipt" requirement imposed by the compulsory license—regardless of whether a local market has an affiliate of a particular network—out of the statute altogether, which is *not* giving effect to every provision.

In fact, the meaning of SHVERA as a whole on this point is quite clear. There is no market that is without an affiliate of at least one of the Big Four networks. Thus, *ab initio*, EchoStar's argument must fail because in every market there is at least one network affiliate and so in every market in which a satellite carrier would desire to import significantly viewed signals it would be required to offer local-into-local service, and each signal carried pursuant to Section 122 in such a market would have to be "received" by a subscriber before significantly viewed signals could be offered. However, there are several dozen markets which do not have a full complement of all four

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[47] 47 U.S.C. § 340(b)(3) (emphasis added).

[48] EchoStar Comments at 14.

affiliates of the Big Four networks. In those markets, a satellite carrier, *provided that it is offering local-into-local service in the market*, can import the significantly viewed signals of stations affiliated with networks that are not represented in the local market. That is what Section 340(b)(3), read together with Section 119(a)(3)(B), means.

Consider, for example, the Charlottesville, Virginia, DMA, which is home to an NBC affiliate and to a PBS station. Provided, again, that a satellite carrier is offering local-into-local service in the Charlottesville DMA with the local NBC and PBS stations, the satellite carrier can import the significantly viewed signals of the ABC and CBS affiliates from the nearby Richmond DMA into the Charlottesville DMA, even though the Charlottesville DMA is not home to an ABC or CBS affiliate.[49] This interpretation gives meaning both to Section 119(a)(3)(B), the compulsory license restriction, and to Section 340(b)(3), because the satellite carrier is not being prohibited from retransmitting a significantly viewed signal "to a subscriber located in a local market in which there are no network stations affiliated with the same television network as the station whose signal is being retransmitted."[50] In addition, it must be remembered that the ultimate policy objective is the provision of local-into-local service in all 210 television markets. EchoStar's proposal provides disincentives that will thwart this goal.

In short, a satellite carrier may not retransmit an out-of-market significantly viewed signal into *any* market in which it does not provide local signal service, and EchoStar's argument to the contrary contravenes the plain language of SHVERA.

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[49] In this particular example, the Richmond Fox affiliate is not significantly viewed in the Charlottesville DMA which is why importation of a Fox affiliate is missing in the example.

[50] 47 U.S.C. § 340(b)(3).

Second, EchoStar argues that the Commission should retain the right to intervene in the waiver process.[51] The Commission has never intervened in the waiver process, and the process has operated smoothly for more than a decade without any regulatory oversight. In fact, SHVERA is quite explicit that waivers are to be "*privately* negotiated,"[52] which obviously evinces Congress's intent that the marketplace, and not a regulatory agency, govern the waiver process. And if the statutory language were not clear enough, the legislative history expressly states that "[t]he Committee does not intend the FCC to grant these waivers or preside over the waiver process."[53] The Commission's tentative conclusion in the *Notice* that "there is no need for rules or procedures concerning waiver arrangements between stations and satellite carriers" is absolutely correct.[54]

Third, EchoStar argues that the required notices to stations should not have to be sent by certified mail; instead, first class mail is adequate.[55] Questions concerning the delivery of mail frequently recur in disputes between satellite carriers (particularly EchoStar) and broadcast stations.[56] Since SHVERA provides specific enforcement provisions for violation of the significantly viewed provisions, it is all the more necessary for the parties to demonstrate full compliance with the statute

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[51] *See* EchoStar Comments at 16.

[52] 47 U.S.C. § 340(b)(4) (emphasis added).

[53] H.R. REP. 108-634, at 13.

[54] *Notice* at ¶ 52.

[55] *See* EchoStar Comments at 18.

[56] *See, e.g.*, *New Life Evangelistic Center, Inc. v. EchoStar Satellite LLC*, DA 04-4055 (released Dec. 27, 2004), at ¶ 5; *Entravision Holdings, LLC v. EchoStar Communications Corp.*, DA 03-2935 (Sept. 24, 2003), at ¶ 5; *Ho'Ana'Auao Community TV, Inc. v. EchoStar Communications Corp.*, DA 03-472 (released Feb. 20, 2003), at ¶ 5; *Family Stations, Inc. v. EchoStar Satellite Corp.*, DA 02-1021 (released May 3, 2002), at ¶ 3; *North Pacific Int'l Television, Inc. v. EchoStar Satellite Corp.*, DA 02-129 (released Jan. 17, 2002), at ¶ 5.

and the Commission's rules. The return receipt is, accordingly, important evidence. Moreover, EchoStar's assertion that no broadcast station rights are triggered by the notice is incorrect. A station needs to be alerted that a potentially duplicating signal is being brought into its market for several reasons: A station may want to challenge the assertion that a particular signal is significantly viewed; a station may elect mandatory carriage in the affected county or counties; and a station will need to monitor compliance with the equivalent and entire bandwidth provisions of Section 340(b). EchoStar's complaint that certified mail entails an "extra cost"[57] above and beyond first class mail cannot be taken seriously. The Commission should require that Section 340(g)(1) notices be sent via certified mail, return receipt requested, as the *Notice* tentatively concluded.[58]

Fourth, and finally, EchoStar argues that a satellite carrier should be permitted on its website to utilize a zip code look-up function to enable a (potential) subscriber to retrieve a list of the significantly viewed signals available in that zip code.[59] If this suggestion is intended to supplement the complete list of significantly viewed signals which is required to be posted on the website, then NAB and Network Affiliates have no objection. But if EchoStar intends this look-up function to replace the complete list of significantly viewed signals available from the satellite carrier somewhere in the country, then NAB and Network Affiliates do object. Section 340(g)(2) is quite explicit that a satellite carrier is obligated to "designate on such carrier's website *all* significantly viewed signals carried pursuant to section 340 of this title and the communities in which the signals

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[57] EchoStar Comments at 18.

[58] *See Notice* at ¶ 60.

[59] *See* EchoStar Comments at 19.

are carried."[60] Because broadcast stations must be able to monitor compliance with SHVERA, a satellite carrier should not be permitted to circumvent the statute by requiring a broadcast station to enter the many hundreds of zip codes that may be present within the station's DMA in order to determine whether the satellite carrier is retransmitting a signal that (i) is significantly viewed (ii) only in eligible counties/communities. The Commission's proposed rule on a comprehensive website listing should be adopted.[61]

Conclusion

For the reasons set forth above and in their opening comments, NAB and Network Affiliates respectfully request that the Commission implement SHVERA's significantly viewed provisions as explained herein and in their joint comments.

[60] 47 U.S.C. § 340(g)(2) (emphasis added).

[61] *See Notice* at ¶ 60; 47 C.F.R. § 76.54(f) (proposed).

Respectfully submitted,

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